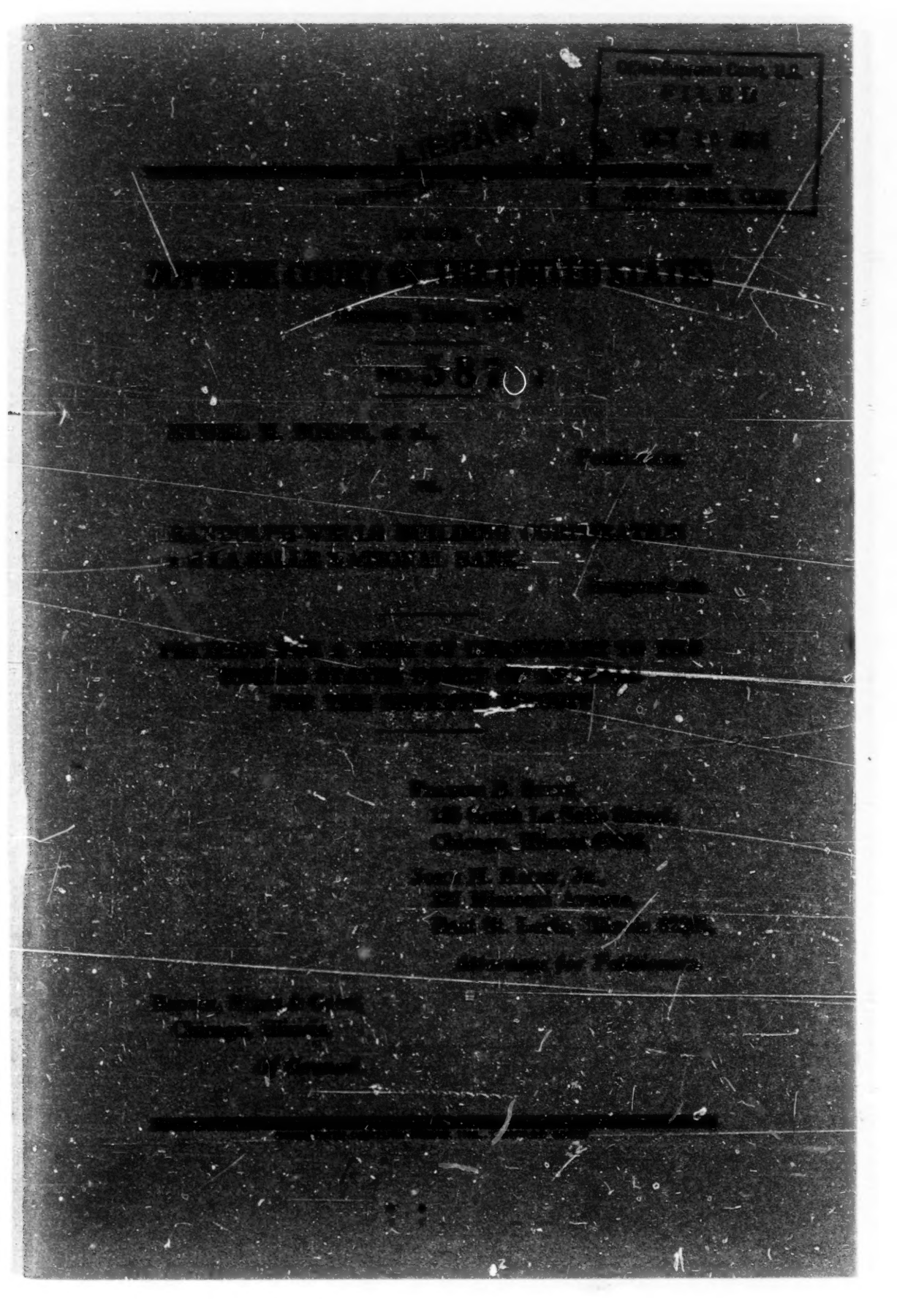

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO.

ETHEL M. BOESE, et al.,

Petitioners,

VS.

RANDOLPH-WELLS BUILDING CORPORATION and LA SALLE NATIONAL BANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on May 15, 1964.[1]

OPINIONS BELOW

The opinion of the District Court, printed in Appendix B hereto, page 41 *infra,* is reported in 215 F. Supp. 849. The opinion of the Court of Appeals, printed in Appendix B hereto, page 31 *infra,* is reported in 332 F.2d 963.

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1. Petitioners, in addition to Ethel M. Boese, are: Elizabeth B. Bozovsky, Berkeley Brandt, Jr., Betsy Brandt Armstrong, Emery Brandt, Helen Brandt McGrew, Mrs. John Campbell, Ernest Z. Elleman, Vern J. Haegg, Herluf A. Henke, Pearl Brown Hoeve, George A. Kalvelage, Evelyn K. Gant, Regina Daley, Bernard F. Mauel, Anna McCarrie, Hazel E. Meagher, Dorothy J. Taylor, John B. Troller, Ruth Ward Maher, Louise E. Ward, Phyllis Ward, Clement I. McCarthy, and Elsie Welch.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1964. Rehearing was denied on July 16, 1964. The jurisdiction of this Court is invoked under 11 U.S.C. § 47 (c) and 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether the Court below has misinterpreted and, therefore, misapplied the criteria for due process established by this Court, causing petitioners and other absentees similarly situated to be deprived of their property, by approving a notice based on constructive service of a Chandler Act bar proceedings which notice (i) was incomprehensible to lay persons and failed to name the absentees, (ii) was sent by registered mail to the absentees on the basis of a thirty year old list of names and addresses, (iii) was published in newspapers least likely to be read by the absentees, and (iv) misrepresented the nature of the proceedings.

2. Whether it was the intention of Congress in the enactment of Section 204 of the Chandler Act, providing for a limitation period with respect to distributions under a plan of reorganization, to confer jurisdiction on a federal bankruptcy court of proceedings by a debtor to bar or cut-off rights to cash paid in complete effectuation of a plan of reorganization, as distinguished from a distribution under a plan.

3. Whether the Court below has retreated from the philosophy consistently expressed by the federal courts and the policy, as well, of the government, through the United States Securities and Exchange Commission, to encourage debtors and indenture trustees to find absentees who have lost sight of their investments or are unaware of their

ownership of securities which have acquired substantial value through the years.[2]

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Constitutional provision involved at bar is the due process clause of the Fifth Amendment to the Constitution of the United States. Statutes involved are sections 120 and 207 of Chapter X of the Chandler Act [11 U.S.C. §§520, 607], relative to the giving of notice in reorganization proceedings, and sections 204 and 205 of Chapter X [11 U.S.C. §§604, 605], having to do with the fixing of a limitation period with respect to distributions under a plan of reorganization and the disposition of unclaimed cash and securities. These provisions are printed in Appendix A hereto, page 29 *infra*.

STATEMENT

The jurisdiction of the District Court was invoked under the Bankruptcy Act.

Of the twenty-four petitioners before this Court seven are original purchasers of first mortgage gold bonds sold in 1927 by the City State Safe Deposit Company, an Illinois corporation, and the remaining are surviving spouses, adult children and, in one instance, a nephew, of original purchasers. Their claims, based on the securities intended for them under the reorganization proceedings hereinafter mentioned, total $49,000. The security for their bonds was originally a first mortgage on a multi-storied office building on the fringe of Chicago's "loop" business district. (R. 139). Petitioners are in court seeking relief from a bar order

2. If certiorari is granted, petitioners request the indulgence of the Court to permit them to argue an additional question, i.e. whether the Court of Appeals has rejected the principle that trustees must act with the greatest good faith and diligence in the protection of the rights of their cestuisque trustent.

entered September 6, 1961, which outlawed their claims on March 6, 1962.

Additionally, sixteen other persons with claims amounting to $19,000, also original purchasers of City State bonds or having direct connections with original purchasers, such as heirs, sought to enter the proceedings by name, but over objection were declined admission on the ground that their interests were being represented by the original petitioners who sought relief for the benefit of themselves and all similarly situated. (R. 230-31). Likewise, Thomas C. Walsh, as Public Administrator of Ingham County, Michigan, representing the estates of P. J. Dunn and Herbert M. Slauson, disappeared or missing bondholders, was declined admission to the case. (R. 264-68).

Respondent Randolph-Wells Building Corporation is the corporate successor to City State. City State and Randolph-Wells were, in sequence, reorganized under section 77B of the Bankruptcy Act, the former in 1935-1936 and the latter in 1937-1939.

Under the plan confirmed in the City State reorganization in 1935 the City State first mortgage bonds (or certificates of deposit representing same) in the amount of $2,359,500 were exchangeable on a dollar for dollar basis for third mortgage bonds (herein called the "1935 bonds") due in 1960 of the then newly organized Randolph-Wells Building Corporation, together with one share of common stock of Randolph-Wells for each $100 bond. (R. 52-53, 55).

The Randolph-Wells reorganization in 1937-1939 provided for the continued exchange of the third mortgage 1935 bonds for the old City State bonds or certificates of deposit, but modified the terms of the 1935 bonds so that the covenant to pay fixed interest at five per cent after November 1, 1940 was eliminated and instead the bonds were to bear earned interest at said rate. (R. 75-76).

The final decrees in the two reorganizations contained no

cut-off date or bar provisions for the exchange of securities, nor were there any reservations of jurisdiction for such purpose. The debtor's reports and the decrees of Court in both reorganizations specifically found that the delivery by the debtor of the 1935 bonds and stock to the indenture trustee for the City State holders was an "irrevocable" delivery in trust and that, whether the old securities were exchanged or not, the City State holders were to be considered, *in praesenti* and *in futuro*, as if they had exchanged their bonds or certificates of deposit. (R. 60, 63, 82, 99-100).

In 1950 respondent LaSalle National Bank accepted appointment as successor trustee under the 1935 third mortgage indenture securing the 1935 bonds when the original trustee, The Trust Company of Chicago, resigned its office. (R. 163-64). At this time, ninety-seven per cent of the City State securities had been exchanged for the 1935 bonds and stock of Randolph-Wells. (R. 158).

In November, 1960, when the 1935 bonds matured, Randolph-Wells offered to the holders, in a voluntary non-judicial reorganization, to exchange their 1935 bonds for new junior mortgage bonds of Randolph-Wells due in 1980. In order to effect this reorganization, it was necessary to secure a release from LaSalle of the 1935 indenture. As a condition to releasing this mortgage, LaSalle required Randolph-Wells to pay to it sufficient monies (i) to satisfy the claims of the 1935 bondholders who declined to participate in the voluntary reorganization, and (ii) to pay the holders of the old City State securities the full amount due on the 1935 bonds which they would have received, plus stock, had they earlier exchanged their old securities in accordance with the terms of the 77B reorganizations. The amount paid LaSalle for the City State holders was approximately $96,000. (R. 159). Upon receipt of these funds LaSalle released the 1935 mortgage indenture and cancelled all the 1935 bonds secured thereby, including those it had been holding for the City State people. (R. 159, 495-96).

On February 14, 1961, approximately three months after paying the money to LaSalle, Randolph-Wells petitioned the District Court to open up the 77B reorganization concluded in 1939, in order to fix a bar date for the exchange of the 1927 City State securities for "stock and 1935 Bonds or cash." (R. 134, 137-38).

On March 27, 1961, a month and a half after initiating the bar action, Randolph-Wells secured leave to file a considerably expanded petition wherein, for the first time, it suggested that the funds which were paid to LaSalle for the City State holders constituted an indemnity deposit for claims which might arise on account of the cancellation of the 1935 indenture [and bonds]. Randolph-Wells prayed, in the alternative, that the Court decide either that the $96,000 held by LaSalle was a trust fund for the City State people, and, if so, that a bar date be fixed for the exchange of the City State securities for cash and stock of Randolph-Wells, or, that it find that the money constituted an indemnity deposit, in which case it should be ordered returned to Randolph-Wells "on demand". (R. 160-61).

LaSalle National Bank, made a respondent to the bar proceedings, awaited the filing of the amended petition before filing an answer wherein it contested the jurisdiction of the Court to reopen the proceedings on the grounds that the case had been finally closed in 1939 with no reservation of jurisdiction to reopen and that the reorganization had been completely effectuated so the Court no longer had jurisdiction over the $96,000 fund. But LaSalle prayed that if the Court should determine to reopen the proceedings, it should decide whether or not LaSalle had any obligation or liability to the holders of the City State securities.(R. 165-66).

While the jurisdiction issue was under advisement on briefs, the Court, on July 17, 1961, entered an order sub-

mitted to it in draft form by Randolph-Wells, which set the cause for hearing on September 6, 1961, at East St. Louis, and directed the debtor to give notice thereof to the City State securities holders by publishing a notice, the format of which was stated in words and figures in the order, for three successive weeks in the Chicago Daily Law Bulletin, in Chicago, Illinois, and in the Journal, at East St. Louis, and by sending the notice by registered mail to the last known addresses of each of the "registered owners" of the City State securities.(R. 168-69).

The notice prescribed by the order was addressed generally to the holders of the City State 1927 first mortgage bonds and certificates of deposit evidencing the bonds. It stated there would be a hearing in East St. Louis on September 6, 1961, on a petition of the debtor to secure an order limiting the time within which the City State securities could be exchanged for the debtor's stock and first mortgage bonds of 1935,[3] and that the noticees could appear at the hearing if they desired.(See R.188a-188c for appearance of notice as mailed and published).

At the time the notice was published and mailed there were forty City State securities holders who had not exchanged their securities. One was an unknown bondholder and the other thirty-nine were persons whose names and thirty year old addresses were contained on a list of City State certificate holders compiled in 1936 by the last depositary for City State securities, the City National Bank and Trust Company of Chicago. This list had been prepared, not from the official "Register" of certificate holders but from duplicate copies of the certificates of deposit which had been issued by City National and its two predecessor

3. These bonds were no longer in existence. They had been retired in November, 1960.

depositaries of the City State bonds.(R.515, 516, Ptnrs. Exh. 4, Exh. Vol. p. 1, R.394).

The notice as published and mailed did not name any of the thirty-nine holders of the certificates of deposit. It did not advise the absentees that the proceedings were to bar their rights to exchange their securities for cash, the full amount of principal and interest due thereon, or, in the alternative, to have the Court find that the monies on deposit with LaSalle were merely an indemnity to be returned to Randolph-Wells on demand. The notice was erroneous in that the two times it described the certificates of deposit it stated that the certificates were issued by The Trust Company of Chicago rather than the Chicago Trust Company (two separate and distinct companies having no connection with each other), and each time it described the certificates it said that they were the ones issued under a Bondholders' Protective Agreement of June 19, 1930, rather than July 19, 1930, the actual date of the agreement.(R. 560a). The notice also erroneously described the 1935 bonds as being "first mortgage bonds."(R. 188a).

The notice was published only once in each of three successive weeks in the East St. Louis newspaper. (R.188c). It was published for three weeks in the Chicago Daily Law Bulletin.(R. 188b).

Printed copies of the notice published in the Chicago Daily Law Bulletin were stapled by the debtor's attorneys to blank letterheads of their firm and inserted in envelopes addressed to the thirty-nine certificate holders from a mailing list which LaSalle had prepared for the debtor's attorneys by culling out the names and addresses from the old list mentioned *supra*, which was some ninety pages long and contained about 1500 names of City State certificate

holders. LaSalle, for the debtor, mailed the notices on July 28, 1961, by registered mail.(R. 182-88).

Of the thirty-nine notices mailed, seventeen registered receipts were returned to LaSalle, evidencing delivery to certificate holders or to someone purporting to represent their interests, and twenty-two undelivered notices were returned to the attorneys for the debtor. (Exh. Vol. pp. 15-20, 21-32).[4]

Nothing was done, either by the bank or the debtor, to find the absentees from the information endorsed by the Post Office Department on the undelivered envelopes except to note "non-delivery" (R. 410, 503), nor did the respondents subsequently contact the certificate holders who received the registered mail notice to inquire why they did not come in for their money. (R. 240-41, 470).

On August 30, 1961, a week before the hearing noticed for September 6, 1961, the District Court passed an opinion and order opening up the 1937-39 bankruptcy proceedings. The Court's opinion is printed at R. 170-79, and is reported in 197 F.Supp. 327. The Court observed, in its opinion, that until the 1927 securities were exchanged or barred there would be no effective termination of the reorganization, that the final decree closing the estate, entered in 1939, was merely ambulatory, and that it would not be inequitable to require the 1927 securities holders to exchange their securities on or before a bar or cut-off date to be fixed by the Court. Additionally, the Court in disposing of the issue as to whether or not the $96,000 was being held by LaSalle as trustee or as an indemnity deposit, found that the money

4. One of the seventeen registered return receipts was signed by a person by the name of "Wolf", purporting to act for certificate holder T. Guthrie Taylor. (Petns. Col. Exh. 5, Exh. Vol. p. 19, R. 393-94). At the time Taylor was hospitalized, in *extremes*. His wife denied that he or she received the notice. (R. 554, 556).

was being held by it as a trustee for the use and benefit of the 1927 City State securities holders. (R. 179, 197 F.Supp. at 332).

The only parties who appeared at the September 6, 1961, hearing were Randolph-Wells and LaSalle, both through their attorneys. (R. 208). At this hearing the Court entered an order finding it had jurisdiction of the parties and all persons in interest as well as the subject matter, and fixed a bar date of March 6, 1962, for the exchange of the City State securities for the principal and interest owing on the 1935 bonds, plus stock, which the absentee City State holders would have received in exchange for their bonds or certificates of deposit had the exchange been made prior to November 1, 1960 (when the 1935 indenture and bonds were retired). The Court additionally reiterated its finding of August 30, 1961, that LaSalle was a trustee of the $96,000 but directed that on the bar date LaSalle should return to Randolph-Wells whatever remained of the $96,000 and of the stock of Randolph-Wells in its possession. (R.180-82).

On September 8, 1961, the attorneys for LaSalle mailed a copy of the September 6, 1961, order to the City State people, using the same mailing list used for the July 28, 1961, mailing of the notice of the hearing. The results of this mailing were essentially the same as the mailing of July 28, 1961. (R. 504-05, Ptnrs. Exh. 8, Exh. Vol. pp. 40-50, R.393-94).

Between July 28, 1961, the date of the registered mail notice, and March 6, 1962, the bar date, the owners of five City State certificates of deposit presented their claims to LaSalle and received approximately $15,000 plus the requisite amounts of stock. On March 6, 1962, the bar date, at 10:30 A.M., the debtor requested LaSalle to turn over the money and stock being held for the City State people and received back the next day $74,957.69, the bank re-

taining $6,035.44 for its expenses in the matter. (R. 240, 242, LaS. Exh. 3, Exh. Vol. p. 103).

Previous to the running of the bar date, two attorneys, A. Arthur Mintz and William Greene, both of Chicago and each separately engaged in the business of tracing missing persons, solicited LaSalle and Randolph-Wells to find the absentee City State holders. (R.328, 341). They each offered their services at no cost to LaSalle and Randolph-Wells, agreeing to look to the persons they located for their compensation. Both were declined employment. (R.327, 329, 341, 344).

LaSalle's vice president Price, in declining to hire the searchers on the City State matter, advised them that the bank was merely acting as a transfer agent and had no authority in the matter. (R.329, 344).

Greene had learned about the missing City State holders when he obtained a copy of a publication showing numerous reorganized companies with imminent bar dates issued by the United States Securities and Exchange Commission in February, 1962, in which the City State bar date was erroneously shown as being May 5, 1962. (R.337, Ptnrs. Exh. 7, Exh. Vol. p. 38, R.342). Greene obtained a list of the City State people from the Court records and searched for them. (R.351-352). Some were easy to find, simply by using the telephone, others were difficult to locate. (R.352-55). By July 26, 1962, the date of the hearing in the District Court to vacate the bar date, Greene had found all of the City State people except the one unknown bondholder. (R.355). All but three of the certificate holders authorized him, through his company, to attempt the collection of their claims. (R. 356).

The petition on behalf of the City State certificate holders to vacate the bar date was filed in the District Court on

April 25, 1962, shortly after the running of the bar date. Of the eight persons possessing interests in City State securities who testified in the case, only two had received the notices of the bar proceedings. The notices they received did not mean anything to them. (R.282, 563-64). These certificate holders had not heard anything about City State or Randolph-Wells since the bankruptcies in the "thirties."(R. 284,564).

Four of the eight City State people who testified were not aware of their ownership interest in City State certificates until contacted by Greene.(R.439,528,532,555). Two others had heard, years ago, of interests in City State bonds of a mother (deceased in 1941) in one instance, and a husband (deceased in 1944) in the other. (R. 273-74, 537-39). None of the people who testified read the Journal from East St. Louis or the Chicago Daily Law Bulletin, nor did they see the SEC publication.

After hearing the cause and considering the matter on briefs, the District Court rendered its opinion of March 29, 1963 holding against petitioners. (App. B, pp. 41-55, 215 F. Supp. 849). In conformity with this opinion, an order was entered on April 9, 1963, dismissing petitioners' proceedings to vacate the bar date.(R. 584).

REASONS FOR GRANTING THE WRIT

1. Nothing is more vital under the law than due process, whether it be relative to deprivation of personal or property rights. Equal justice under the law depends on due process, without it justice is meaningless. That a serious due process question is involved at bar was acknowledged by the Court of Appeals in its opinion. (App. B, p. 34). Then that the Court below should turn this cause on a headnote in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, as the Court of Appeals did (App. B, p. 36),

is to indulge in a superficial application to the case at bar of the meaningful standards of due process laid down in *Mullane* and other carefully considered adjudications of this Court.

The *Mullane* case factually is the converse of the instant case. *Mullane's* facts are the antithesis of those at bar. This Court has applied the standards of due process to *Mullane* at one factual extreme. It should, petitioners submit, now apply these standards to a diametrically opposite case so that all now or hereafter involved with due process may better gauge their position. In short, petitioners urge that the decision below conflicts in principle with this Court's decision on due process and that the conflict is a substantial one warranting the issuance of a writ.

In *Mullane* there were 113 separate trusts participating in a common pool involving great numbers of beneficiaries, many whose interests were contingent and ephemeral. Similar to the old case of *Jarndyce* v. *Jarndyce,* people constantly were being borne into *Mullane* and dying out of it. The common trust was only fifteen months old at the time of the application for judicial approval of its stewardship of the trust. As various trusts joined the pool the adult beneficiaries, known to the trustee bank and whose record addresses the trustee had, were advised of the procedures by mail. Periodic remittances of income were made to these beneficiaries from time to time, also by mail. As to these beneficiaries, this Court held that publication was insufficient and that they should have been notified at least by ordinary mail. (336 U.S. at 318).

However, as to the presumptive remaindermen and contingent beneficiaries in *Mullane,* this Court said it was not reasonably possible or practicable to give more adequate warning than by publication. This Court pointed out that the financial burden on the trustee to keep abreast of changes

in interests by investigations and searches would dissipate the advantages of the trust, and clearly it would. (336 U.S. at 317).

But at bar, presumably, there were only thirty-nine certificate holders whose names were known, plus one unknown bondholder. Those being borne into the case and dying out of it were relatively negligible. Unlike *Mullane*, where the trust was only fifteen months old, the people at bar had not had contact with respondents for some twenty-six years. No remittances, periodic or otherwise, had been received by the City State holders on their securities since 1930. The thirty year old list of names and addresses had never been up-dated or made current. In fact, the fewer City State people who turned up during the years to claim their rights, the better it was for Randolph-Wells, for the latter was not obliged to pay interest to the absentees. Unlike the tremendous cost to the Hanover bank in *Mullane* to search out the ephemeral interests, at bar professional searchers offered to trace the absentees without cost or charge to respondents.

It is apparent that the posture of *Mullane* is substantially different than the case at bar. But in requiring notice by ordinary mail to the beneficiaries whose names and addresses—current addresses—were on the books of the Hanover bank, this Court did not say, inferentially or otherwise, as the Courts at bar would have it, that a mailing based on a thirty year old list of addresses, assisted by publication, but without any other effort to reach the absentees, satisfies the minimal requirements of due process.

Section 204 of the Chandler Act (App. A, p. 29), stating the requirements for fixing a bar order provides for "notice to all persons affected." It is noted in 6 Collier on Bankruptcy (1947 14th ed.) § 9.23, p. 2898, that certain sections of Chapter X which require not only that notice be given of particular proceedings, but additionally designate the persons to whom it should be given, are instances wherein

Congress deemed the factor of notice to be of paramount importance.

Sections 120 and 207 of the Chandler Act (App. A, pp. 29, 30), authorized the court (or judge) to designate, if not otherwise specified, the time within which, the persons to whom, and the form and manner in which notices shall be given. These sections provide a flexible machinery for notice in Chapter X cases. 6 Collier on Bankruptcy (1947 14th ed.) §9.26, p. 2910. But, as the author observes, while the mode of effecting service rests with the Court, it must be within constitutional limitations. (Collier, supra, §3.39, p. 776).

The notice at bar, in two sentences of twenty-nine lines of fine print packed with one hundred forty-four words, purported to tell the absentees what the proceedings were about. None of the absentees who received it understood the notice. What was said in the twenty-nine lines was incomprehensible to persons of ordinary intelligence, which is the standard of measurement. *Bellingham Bay & B.C.R. Co.* v. *New Whatcom,* 172 U.S. 314, 318. Compounding the amalgam of words, there were mistakes in the descriptions of the securities in that the notice twice described the certificates of deposit as being those issued by The Trust Company of Chicago under date of June 19, 1930, rather than by the Chicago Trust Company under date of July 19, 1930. The District Court, in substance, said that petitioners were circumspect on this point for, the Court observed, that the securities involved were adequately identified in the remainder of the notice. (App. B, p. 50). But petitioners are not so certain that this is so and contemplate how wrong can a notice be and yet be held legally efficacious. Would a certificate holder in Depue, Illinois, or Chicago, or New York, receiving this notice and carefully comparing it with his musty certificate be convinced that the securities mentioned pertained to him?

The failure of a notice, as at bar, to name the parties to be reached was said by this Court in *Mullane* (339 U.S. at 315) to reduce the chance of its coming to the attention of those it is supposed to attract and does not inform acquaintances who might call it to attention. This Court also emphasized the necessity for naming the noticees where they are readily ascertainable in *Schroeder* v. *City of New York*, 371 U.S. 208, 210.

The mailing of the notice on the basis of an antiquated list of names and addresses without reasonable supplementary investigation under the circumstances involved, i.e. the exercise of due diligence, is contrary to all precepts of the law of constructive notice. In *Mullane* this Court recognized this principle, saying (339 U.S. at 317):

> "Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. [of persons as to whom it is not reasonably possible or practicable to give more adequate warning than publication]."

Ordinary standards of diligence under the circumstances of this case involving thirty year old records, the few people involved, the fact that they could be discovered upon investigation, and the substantial money at stake warranted some reasonable attempt to reach them.

The Courts below held that the debtor was diligent in giving the notice because it followed the court order, which begs the issue, and that LaSalle was diligent in sending out a copy of the bar order on the basis of the thirty year old list supplied by LaSalle's predecessor, the "Chicago Trust Company". The Court of Appeals even found that LaSalle was the last depositary for the old bonds. (App. B, p. 35). In the latter finding the Court of Appeals is clearly er-

roneous for LaSalle was never a successor depositary under the Bondholders' Protective Agreement of July 19, 1930. LaSalle succeeded The Trust Company of Chicago as trustee under the 1935 indenture and as such exchanged 1935 bonds for the 1927 City State bonds and certificates of deposit as they dribbled in. (R. 490, 515-16). But LaSalle never had any privity or connection with the original depositary for the 1927 bonds, the Chicago Trust Company, or its successors, nor did it have any connection with the bondholders' committee.

The Courts below, by confusing the old Chicago Trust Company with The Trust Company of Chicago, have visited upon petitioners an anathema which has resulted in relieving respondents of a duty of diligence which, in law, exists and has placed a duty of diligence on the 1927 securities holders which, in law, does not exist.

No amount of persuasion below has induced the Courts to revise their thinking and to cease indulging in an illegal transmutation whereby they hold that the duty under the old Bondholders' Protective Agreement on the part of the City State holders to keep the depositary advised of changes of address has inurred to the benefit of LaSalle and Randolph-Wells. Ironically, the Bondholders' Protective Agreement which was designed to protect the bondholders, who, years ago, in good faith deposited their bonds with the bondholders' committee, has been turned against them by the Courts. The bondholders' committee and the depositary ceased to function and went out of existence with the completion of the first 77B reorganization in 1936 and have never been revived since. (R.45, 46, 57, 494). Now Randolph-Wells and LaSalle are afforded sanctuary under an extinct agreement to which they never had any connection. This is something only Gaius could explain to petitioners.

In tendering to the District Court an order directing

publication of a notice in the Chicago Daily Law Bulletin, a newspaper dedicated to the service of the legal profession in Chicago, and in the Journal, at East St. Louis, a newspaper at the seat of the Court with a circulation apparently limited to St. Claire County (R.188c), Randolph-Wells virtually eliminated any chance of the notice being seen by the absentees. Of the thirty-nine certificate holders, the one living closest to East St. Louis was a resident of Peoria, Illinois, 150 statute miles away. (Lord, R.186). The publication of the notice in the Chicago Daily Law Bulletin was equally futile. No one who testified read the Chicago Daily Law Bulletin and there is no evidence in the case that any City State holder was a lawyer or even remotely interested in reading a newspaper dedicated to lawyers.

Twelve of the thirty-nine City State holders resided in Wisconsin, ten in the Chicagoland area, nine in Michigan, and the remainder in various places such as New York, Ohio, Montana and California. If it was the desire of the debtor to reach any certificate holders, logic would have dictated the placing of the advertisement in a large Madison or Milwaukee, Wisconsin, newspaper and in a large Chicago paper having circulation in Michigan. (R.183-88).

Emphasizing the importance of the content of a judicial notice and where it should be published, this Court, in *Schroeder,* supra, declined to tolerate in the name of due process a legal notice which failed to name the affected property owner, failed to explain her legal rights, and was published in newspapers many miles from her property, to the exclusion of newspapers being published in larger towns nearby. (371 U.S. at 210).

The notice to petitioners at bar told them that a proceeding was pending to secure an order limiting the time within which the old City State securities could be exchanged for Randolph-Wells securities of 1935. This notice

would hardly galvanize into action any City State holders who, receiving it, and understanding it, remembered the long and bumpy trail of the reorganizations, as the District Judge so aptly described them, and who long ago had written their investments off as completely hopeless. These people would hardly be interested in receiving third mortgage 1935 securities and stock of no value.

The proceedings had nothing to do with the fixing of a bar date for the exchange of 1927 securities for 1935 bonds. As noted, there were no 1935 bonds in existence. The bonds had been cancelled and the trust deed securing them released. The court action was to fix a bar date for the surrender of the 1927 securities for stock and the principal and interest due the City State people or, in the alternative, to have the $96,000 held by LaSalle declared an indemnity and returned to Randolph-Wells.

The trial court's observation that the sending out of copies of the bar order remedied the defects in the notice loses sight of the fact that the notice required by the mandate of Section 204 of the Chandler Act, i.e. "notice to all persons affected" is the notice that either conferred or failed to confer jurisdiction. The bar order sent out September 8, 1961, after the proceedings were over could not retroactively bestow jurisdiction on the Court. Extra-statutory notice does not supply constitutional validity to a statute or to service under it. *Wuchter* v. *Pizzutti*, 276 U.S. 13, 24. In any event, the District Court's rationale that the sending out of the bar order rectified deficiencies has no effective application to the twenty-two people who did not receive the bar order and as to whom jurisdiction depends on the published notice.

In *Mullane*, supra, this Court said that "The notice must be of such nature as reasonably to convey the required information." The "required information" is to give the addressees an opportunity to decide whether to appear or

default, acquiesce or contest. (*Mullane*, 339 U.S. at 314). In *Grannis* v. *Ordean*, 234 U.S. 385, 397, this Court said that notice of the commencement of an action should advise of "its purpose."

The palpable inadequacy of the notice at bar is demonstrated by the total absence of any City State holders at the hearing on September 6, 1961, and by the fact that only five out of sixteen who received the notice subsequently claimed their money. One holder, The First National Bank of Chicago, as executor of the will of a deceased certificate holder, moved in with alacrity, receiving payment on August 30, 1961, but the other four failed to come in for some time, one in October, 1961, two in November, 1961, and one in February, 1962. It is reasonable to infer from this delay in applying for their exchanges that they did not know what the litigation was about, either, but through some fortuitous circumstances were enlightened. People do not react negatively to the prospect of a "windfall" as Randolph-Wells described the situation below.

The test of respondents' actions in attempting to reach the absentees, which they fall short of passing, is that suggested by this Court in *Mullane* (339 U.S. at 320): Would respondents' attempts at bar to reach the City State absentees satisfy a prudent man of business, counting his pennies, but finding it in his interest to convey information to thirty-nine persons whose names and addresses are in his files?

Petitioners have never insisted at bar that respondents were under a duty to employ any particular professional searcher or any at all. Petitioners have urged, however, that under the circumstances here presented it is not unreasonable to require that some investigation be made to locate the absentees, at least to satisfy the requirements of ordinary diligence as a basis for constructive service. Whether

respondents handle the inquiry themselves or permit it to be done by experts, and particularly at no economic hardship to them, is immaterial. How they could be hurt by employing searchers is beyond the comprehension of petitioners.

2. The Court of Appeals, in rejecting petitioners' contention below that Randolph-Wells, in depositing the $96,000 with LaSalle, made an irrevocable appropriation of the money for the City State holders, has permitted Randolph-Wells to use Section 204 of Chapter X to implement a private reorganization which was never the intent of Congress when it enacted this law. The Court of Appeals in stating that petitioners did not raise this point in the Trial Court is mistaken. It was raised and argued in the briefs before the District Judge and petitioners submit that was sufficient. In any event, it is an argument going to the jurisdiction of the Court over the subject matter and may be raised at any time, even *sua sponte*. The question of jurisdiction is recognized by the Court of Appeals in the concluding observation of its opinion to the effect that if petitioners' argument is sustained, it would "in effect void the Court order fixing the cut-off date." (App. B, p. 40).

In paragraph 9 of their petition to vacate the bar order petitioners alleged that the $96,000 fund was deposited "to satisfy completely the claims of all the holders" of the 1927 securities and that there was due to them $95,991.84 for principal and interest. (R.191). In its answer to this allegation Randolph-Wells admitted that the money was paid over to LaSalle to satisfy the claims of the City State holders but denied that from and after November 1, 1960 (when the 1935 bonds matured), "it owed or now owes any principal or interest on said 1927 Bonds." (R.212). Randolph-Wells thereby said that upon the turnover of the money to LaSalle it had discharged its obligations to the

City State people and no longer owed them anything. This is a judicial admission concluding Randolph-Wells on the issue of payment and trust funds as opposed to that of indemnity.

Since, additionally, the District Court by its opinion of August 30, 1961, rejected the "indemnity theory" by finding the $96,000 paid to LaSalle was a trust fund "for the use and benefit of the holders of the 1927 bonds or certificates of deposit," the Court of Appeals' conclusion that the money was paid to LaSalle "to protect LaSalle" (App. B, p. 39), i.e., it constituted an indemnity fund, not only brings the two Courts into a collision with reference to this important issue, but as noted is contrary to the position taken by Randolph-Wells in its pleading.

Petitioners' "irrevocable appropriation" argument is based on two principles. The first is that Randolph-Wells may not pay off its obligations to petitioners and then, later on, recover the consideration it turned over to LaSalle to discharge these obligations. The second proposition is that even if such a miracle may be accomplished under certain circumstances in corporate reorganizations under Section 204 of the Chandler Act, it may not be done in the instant case because this section has no application to a reorganization which has been completely effectuated. Petitioners' cited below *Steel Cities Chemical Co.* v. *Virginia-Carolina Chemical Co.*, 1925, 2 Cir., 7 F. 2d 280, to support the proposition that where a court finds an intention on the part of an obligor to part with control over funds deposited to pay its obligations, it amounts to an irrevocable appropriation. True, in the *Steel Cities* case, as the Court below pointed out, the unused portion of the funds ultimately was to go back to the obligor, but this was because of an express provision in the trust deed providing for it, and not on account of the fact that there was no

other place for the money to go or because of a subsequently entered bar order.

In *Pennsylvania R. Co.* v. *United States,* 1938, 3 Cir., 98 F. 2d 893, 894, the railroad sought recovery of unclaimed funds on deposit in the treasury of the United States to pay a judgment it owed to absentee bondholders of a canal company. The relief requested was denied by the Court which held that when the railroad paid over the money it was a payment of its indebtedness to the holders of the bonds. The Court observed that the money was the Railroad's money until it made the payment, but at that moment the title passed to the bondholders. The Court said, (p. 894):

> "As the court below pointed out, the situation so far as the Railroad Company was concerned, was the same as if it had paid its promissory note to a collecting bank which held the proceeds awaiting the call of the payee."

In *United States* v. *Cochrane,* 1936, 5 Cir., 87 F. 2d 3, an assignee of the purchaser of railroad property on foreclosure sale sought recovery of unclaimed funds held for missing bondholders. The requested relief was denied, the Court saying (p. 5): ". . . it does not appear on what ground the purchaser would be entitled to both the property sold and the proceeds of the sale." At bar the transaction in effect was a purchase by Randolph-Wells for $96,000 of its 1935 bonds on deposit with LaSalle for the City State holders. Randolph-Wells received its bonds back duly discharged, the trust deed securing them was released, and, as matters now stand, it has its property in the form of the bonds and the proceeds of sale, as well.

The author states in 6 Collier on Bankruptcy (1947 14th ed.), sec. 9.22 p. 2890: "A reading of §204 demonstrates a clear Congressional intent that the judge should provide

a limit of not less than five years *with respect to the process of distribution under the plan, . . .*" (Emphasis supplied). Section 204 as implemented by Section 205 has to do with distribution under a plan of reorganization and at bar the distributive shares of the City State people were the 1935 bonds and stock of Randolph-Wells. The plans at bar did not provide that the City State people were to receive cash in exchange for the City State securities *upon distribution.* For the District Court to so provide now would be a material change in the plan requiring a new reorganization. When the $96,000 was turned over to LaSalle in November, 1960, to pay the 1935 bonds destined for the City State people and the bonds were cancelled, the reorganization was then completely effectuated. The bonds to be distributed had been paid. It is not the function, either, of Sections 204 and 205 to sanction the placing of a limitation on distribution of a non-existent security.

The Court of Appeals said in its opinion that it did not understand from petitioners' argument where petitioners think the unclaimed portion of the deposit should go. Petitioners think it should have been held by LaSalle and eventually, if necessary, be turned over to the State of Illinois as unclaimed property where it would be recoverable at any time by the absentees upon appropriate application. Ill. Rev. Stat., 1963, ch. 141, secs. 119 et seq.

In one of the Pennsylvania canal cases, *Brown* v. *Pennsylvania Canal Co.*, 1921, E.D. Penna., 274 F. 467, the circumstances were like those at bar in that for many years the bonds were regarded as being of no value, no interest had been paid and "holders lost sight of the fact that they were holders and the obligor lost touch with the obligees." In this case Judge Dickinson said (p. 469):

> "The absentees may at any time present themselves, although their appearance has become now barely more

> than a possibility. If and when they do appear the moneys belonging to them should be here for them. If they never appear, the claim of the United States to the money is as well founded as that of anyone else, and is a better claim by reason of the fact that no one else has any claim."

Clearly, the 1935 bonds having been retired and cancelled in November, 1960, were not available for distribution in February, 1961, when the debtor filed its petition to reopen the 1937-1939 bankruptcy reorganization. The question then is, did Congress, under Section 204 of the Act, intend to extend the jurisdiction of federal bankruptcy courts to include jurisdiction over transactions, extraneous to distributions under a plan, so as to empower the Court to apply a federal statute of limitations where it does not belong and may conflict with state limitations acts. It is urged that this issue involving jurisdiction of a federal court is of sufficient importance to warrant this Court's issuance of a writ to resolve it.

3. In the case of *In re Plankinton Bldg. Co.*, 1943, 7 Cir., 135 F. 2d 273, at page 276 of its opinion, the Court below expressed in a footnote its awareness of the fact that through the diligent efforts of the parties the holders of securities of a value of about $14,000 were brought to light. The Court commended the parties for their actions.

But at bar the Court of Appeals has regressed from the philosophy it expressed in *Plankinton* by holding that respondents had no duty to make a reasonable attempt to reach the absentees with a notice of a bar hearing which would result in their being deprived of valuable property rights, i.e. the mere mailing of a notice on the basis of a thirty year old list of names, together with an impersonal broadcast by publication in obscure newspapers, was an exercise of due diligence.

The Court's regression from *Plankinton* is further manifested by its concomitant finding below that the responsibility was on the absentees to keep respondents informed of their movements and status. This apparently is so notwithstanding the fact that many of the absentees were unaware of their ownership of the City State securities and those of the absentees who were aware of their investments had ample reason, because of the miserable financial history of the debtor and its predecessor, to lose sight of them.

But other federal courts are not of the same view as the Court below on the subject of reaching absentees.

In the reorganization proceedings of *In re Midland United Co.*, 1953, D.C. Del., 114 F. Supp. 698, the SEC applied a few days before the running of the bar date to extend the time. The Court had previously authorized the reorganized companies to spend up to $50,000 to trace missing security holders and the companies had actually spent over $36,000 of this money. The case had been in litigation for nearly nineteen years. The factor persuading Circuit Judge Briggs to grant a short extension of the bar date as requested by the SEC was his conviction that about $171,000 in value of old securities were held in only three accounts, in any event, by a comparatively small number of owners. The Court said (114 F. Supp. at 699):

> "If the number of persons owning the outstanding debentures is in fact so small it would seem unjust not to allow further efforts to be made to locate them and to cause them to deposit their securities. *Personal solicitation,* if the holders of these debentures can be found, might result in their receiving substantial sums. For this reason, I shall extend the termination date to November 30, 1953 and no longer. During this period the Companies, Realization and Utilities, should continue their efforts to cause the holders or owners of the outstanding stocks to participate in the plan.

> "I shall make no specific order directed to the Companies. They will treat this opinion as a directive and *I know that they will carry out the wishes of the Court vigorously and in good faith.*" (Emphasis supplied.)

Judge Knox, in the case of *In re Inter-Regional Properties, Inc.*, 1947, D.C. S.D. N.Y., No. 65429, rendered the following memorandum opinion:

> "Under present day real estate conditions, the original securities held by persons who have not seen fit to exchange them for bonds and stocks of the reorganized company are of substantial value. In the absence of a serious and diligent effort on the part of petitioner to apprise them of their rights, such value should not now, or in the future, become forfeit to petitioner. It is well within the range of possibility that, if petitioner carries on a well directed search for the security-holders in question, many of them may be found, and induced to protect their interests."

In *Gillespie* v. *Fort Dodge, D.M. & S. Ry. Co.*, 1953, 8 Cir., 203 F. 2d 119, cert. den. 346 U.S. 827, the Court vacated a bar date effective in 1949 to permit a holder to exchange his securities. This individual had moved in 1931 from a New York address to Rye, New York, and had failed to notify the depositary of his change of address. The Court said (203 F. 2d at 123):

> "The fact that there had been some change in the owner's address might have been inferred from the return of the one registered letter sent to him, but there was no indication that he was fugitive or hiding and as his testimony showed, he could readily have been found and reached by mail. It does not appear that the court was ever advised of the fact that a letter had been sent to Gillespie and returned undelivered and it may well be that if the court had been so informed it would have directed that steps be taken to find him."

The SEC through the years has spent public funds in considerable amounts to prevent losses to security holders who have not participated in reorganization plans. (See SEC release of February, 1962, Ptnrs. Exh. 7, Exh. Vol. pp. 35-39, R. 342-43).

In the light of the decision below, the efforts of the SEC and those of the courts to find absentee investors, are totally unnecessary and the SEC is being wasteful of public funds. The decision below is one for which speculator-acquired reorganized companies have been looking. On the other hand, many hundreds of investors who, for good reason or not, have lost sight of their securities, as well as those who do so in the future, have a stake in this litigation. Whether or not the Court below is right and the other cited decisions, including the SEC policy is wrong, is of manifest importance and should be passed on by this Court. The decision below, accordingly, calls for an exercise of this Court's supervisory power.

CONCLUSION

Petitioners, for the reasons assigned, respectfully urge this Honorable Court to issue a writ of certiorari to the Court below.

Respectfully submitted,

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CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Appendix A

AMENDMENT V. Due Process of Law

*** * * nor be deprived of life, liberty, or property, without due process of law; * * ***

[Titles 1-9 U.S.C. p. XLVI]

Section 120 of Chapter X of the Chandler Act [11U.S.C. §520]:

> §520. Notices.
>
> Whenever notice is to be given under this chapter, the court shall designate, if not otherwise specified hereunder, the time within which, the persons to whom, and the form and manner in which the notice shall be given. Any notice to be given under this chapter may be combined, whenever feasible, with any other notice or notices to be given under this chapter. (July 1, 1898, ch. 541, § 120, as added June 22, 1938, ch. 575, § 1, 52 Stat. 885.)

Section 204 of Chapter X of the Chandler Act [11U.S.C. §604]:

> §604. Surrender, etc., of claims upon distribution under plan.
>
> Upon distribution, as provided in section 624 of this title, the judge may, upon notice to all persons affected, fix a time, to expire not sooner than five years after the final decree closing the estate, within which, as provided in the plan or final decree—
>
> (1) the creditors, other than holders of securities, shall file, assign, transfer, or release their claims; and

(2) the holders of securities shall present or surrender their securities. After such time no such claim or stock shall participate in the distribution under the plan. (July 1, 1898, ch. 541, § 204, as added June 22, 1938, ch. 575, § 1, 52 Stat. 894.)

Section 205 of Chapter X of the Chandler Act [11 U.S.C. §605]:

§605. Same; unclaimed cash and securities.

The securities or cash remaining unclaimed at the expiration of the time fixed as provided in section 604 of this title, or of any extension thereof, shall become the property of the debtor or of the new corporation acquiring the assets of the debtor under the plan, as the case may be, free and clear of any and all claims and interests. (July 1, 1898, ch. 541, § 205, as added June 22, 1938, ch. 575, § 1, 52 Stat. 894.)

Section 207 of Chapter X of the Chandler Act [11 U.S.C. §607]:

§607. Intervention of parties; notices generally.

The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter. Except where otherwise provided in this chapter, the judge may from time to time enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notice shall be given. (July 1, 1898, ch. 541, § 207, as added June 22, 1938, ch. 575, § 1, 52 Stat. 894.)

Appendix B

In the Matter of RANDOLPH-WELLS BUILDING CORPORATION, Debtor.

Ethel M. BOESE et al., Petitioners-Appellants,

v.

RANDOLPH-WELLS BUILDING CORPORATION and LaSalle National Bank, Respondents-Appellees.

No. 14261.

United States Court of Appeals

Seventh Circuit.

May 15, 1964.

Rehearing Denied July 16, 1964.

Before DUFFY, SWYGERT and MAJOR, Circuit Judges.

MAJOR, Circuit Judge.

Appellants (petitioners), are twenty-four individuals who are the original owners, or own or have an ownership interest through inheritance or devise from original owners, of certificates of deposit representing first mortgage bonds issued in 1927, by City State Safe Deposit Company, an Illinois corporation (City State).

The present debtor, Randolph-Wells Building Corporation (Randolph-Wells) is the corporate successor to City State and came into being as the result of the latter's reorganization under Section 77B of the Bankruptcy Act in 1935-1936 (No. 7034). Randolph-Wells in turn was reorganized under Section 77B in proceedings commenced in 1937 and concluded in 1939 (No. 7464). The LaSalle Na-

tional Bank (LaSalle) was the successor indenture trustee for the 1935 bonds of Randolph-Wells which, under both reorganization plans, were exchangeable, together with common stock of Randolph-Wells, for the old City State first mortgage securities, including those now claimed or owned by petitioners. The final decrees closing the estate in the two reorganization proceedings did not provide any time limit within which the old City State securities could be exchanged for the 1935 securities and common stock of Randolph-Wells.

In November 1960, Randolph-Wells effected a voluntary reorganization, as a part of which it at LaSalle's request deposited with it approximately $96,000, to pay principal and interest then owing and due on its 1935 bonds which petitioners and other holders of the old City State securities were entitled to receive, together with common stock then lodged with LaSalle, in exchange for their old securities under the reorganization plans.

In February 1961, Randolph-Wells petitioned the District Court to reopen its 1937-1939 reorganization for the purpose of having the Court fix a bar or cut-off date for the exchange of the old 1927 securities of City State for the 1935 securities and stock of Randolph-Wells. LaSalle was made a party to this proceeding, and in answer to the petition alleged that the proceeding in No. 7464 was terminated by a final decree in 1939, that the plan of reorganization had been completely effectuated and, therefore, the Court was without jurisdiction or authority to grant the relief sought by Randolph-Wells.

The District Court (Judge Juergens) in a written opinion decided this issue adversely to LaSalle and ordered a hearing on the petition of Randolph-Wells to have a bar or cut-off date filed. In Re Randolph-Wells Building Corpora-

tion, Debtor, D.C.Ill., 197 F.Supp. 327. In this opinion, the Court stated (197 F.Supp. page 332):

> "It is eminently clear that LaSalle, as trustee, has the power to represent all of the bondholders. It is also clear that LaSalle, as trustee, has a duty to the bondholders so long as it remains trustee and should represent the unknown owners for so long as these unknown owners have a valid claim which may be asserted by the presentation of the 1927 bonds for exchange or until such time as these bonds may validly be presented for exchange."

After a rather extended hearing, the Court, on September 6, 1961, entered an order setting a bar or cut-off date of March 6, 1962. Notice of the pendency of this proceeding was given by publication and by sending a copy of the publication notice to the holders of the old City State securities by registered mail to their last known addresses. Upon the entry of the bar order, LaSalle also mailed out copies of this order to such holders at their last known addresses. Five holders surrendered their City State certificates prior to the bar date and received from LaSalle payments aggregating $14,998.71, as well as shares of Randolph-Wells. The remaining certificate holders, including petitioners and those whom they claim to represent, neither surrendered their securities nor took any steps to redeem them until after the expiration of the bar date.

Thereupon, petitioners, on April 25, 1962, initiated the current proceedings to vacate the Court order of September 6, 1961, fixing the bar or cut-off date of March 6, 1962. Petitioners prayed in the alternative that the Court extend the bar date to give City State security holders who had not done so an opportunity to realize on their securities. In this proceeding, Randolph-Wells and LaSalle were named respondents.

Petitioners sought to vacate the bar order on the grounds (1) that notice of the proceedings by publication and mailing failed to satisfy the requirements of due process; (2) that Randolph-Wells, aided by LaSalle, committed a fraud upon City State security holders, including petitioners, which vitiated the proceedings; (3) that substantial mistakes made in the bar proceeding required its reopening, and (4) that there was a lack of jurisdiction to reopen the proceedings because there had been a complete effectuation of the plan of reorganization (the Court, as heretofore noted, had decided this issue in favor of Randolph-Wells).

On April 9, 1963, the Court, after a hearing and consideration of much oral and documentary evidence, entered an order dismissing the petition to vacate its bar order of September 6, 1961, or, in the alternative, to extend the bar date established. It is from this order that the appeal comes to this Court.

In connection with its order of dismissal, the Court again filed an opinion in which is accurately detailed the evidentiary facts, its findings of fact and its reasoning, which culminated in the decision adverse to petitioners. In Re Randolph-Wells Building Corporation, D.C.Ill., 215 F.Supp. 849. We see no reason to burden this opinion by repeating the Court's statement of facts. Therefore, we adopt its opinion to and including the first two full paragraphs on page 854 of 215 F.Supp. as a part of this opinion.[1]

In our judgment, the only serious question here is whether notice to petitioners of the pendency of the bar proceedings was sufficient to meet the standards of due process. As set forth in the statement of facts by the District Court (215 F.Supp. page 852), an order was entered by that Court July 17, 1961, setting forth in detail the manner and means to be employed by the parties in giving notice of the bar proceedings. This order was strictly complied with. Com-

1. The adopted portion of the District Court's opinion is contained on pp. 41 to 49 of this Appendix.

menting thereon, Judge Juergens in his opinion stated (215 F.Supp. page 856):

> "In the instant case both the debtor (by following the Court order in giving the required notice) and LaSalle (by mailing notices of this Court's order, establishing the bar date, to the addresses shown on the list supplied to them by their predecessor, who in turn had received them from the depositors themselves) have in effect acted with due diligence in giving the required notice."

The statement, "list supplied to them by their predecessors," refers to bondholders, including petitioners, who were parties to a Bondholders' Protective Agreement entered into July 19, 1930, in which the Chicago Trust Company was designated as trustee and depositary for the bonds. Various trust companies and banks successively served as depositaries for the bonds in question, the last being LaSalle National Bank.

The protective agreement provided that certificates of deposit issued thereunder were to be registered in books kept by the depositary, that the depositors were to be parties to the agreement and bound by all the terms and conditions with the same effect as if they had personally signed the agreement and that, as to the addresses of depositors and the mailing by the depositary of notices, securities and checks, the following provision would control:

> "Sec. 1.09. Before issuing any certificate the Depositary may require a Depositor to furnish to it in writing his post-office address. Such address or any change therein, written notice of which is given by the Depositor to the Depositary prior to the mailing or sending of any notice or any other document or the distribution of any securities, shall be conclusively deemed the correct mailing address of such Depositor

> for the mailing or sending of such notice, document, or securities. Certificates of deposit, stock certificates, bonds, notes, checks and any other securities which at any time may be issuable or distributable to the Depositor may be mailed to him by the Depositary or the Committee at his address appearing on the books of the Depositary, but such mailing shall be at the Depositor's risk."

The District Court, as to the rights and duties of the bondholders under this agreement, made the following pertinent observation (215 F.Supp. page 855):

> "Thus there is placed on the depositors a duty to supply, firstly, their correct mailing address and, secondly, the duty to notify the depositary of any change in that address. The original list consisted of in excess of ninety pages and contained the names and addresses of about fifteen hundred holders of certificates of deposit. Considering the long and bumpy trail of this reorganized corporation and its shaky predecessor, the various trustees appear to have accomplished a monumental task since over ninety-eight per cent of the original holders of the City State securities have exchanged their securities for Randolph-Wells securities."

Petitioners—in fact, both sides—rely heavily upon and quote extensively from Mullane v. Central Hanover Bank & Trust Co., Trustee, et al., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, in support of their respective contentions on the issue of notice to petitioners in the bar proceedings. The Court in that case held as to some of the parties that the notice by publication was insufficient to accord due process, but we think the instant situation is distinguishable on the facts. The distinction is emphasized by the headnotes to the Mullane opinion where it is stated:

> "The statutory notice by publication is sufficient as to any beneficiaries whose interests or addresses are

> unknown to the trustee, since there are no other means of giving them notice which are both practicable and more effective."

On the other hand, the Court stated that such notice is not sufficient as to "known persons whose whereabouts are also known, since it is not impracticable to make serious efforts to notify them at least by ordinary mail to their addresses on record * * *." In the instant case, neither the trustee nor the debtor had any knowledge of the names or whereabouts of owners of securities other than those shown by the register which LaSalle had received from its predecessor trustee. Moreover, not only was there notice by publication in compliance with the Court's order but, in addition, LaSalle, on September 8, 1961 (two days after the entry of the bar order), mailed a copy of this order to the last known address of each holder of an unexchanged certificate of deposit. Of the thirty-nine notices mailed, sixteen were received. Five of those receiving notice presented their certificates of deposit to LaSalle, for which they received $14,998.71. Thus, it is shown that mailing of notice, in addition to publication, conforms to the Court's suggestion in Mullane.

Petitioners argue that the registered list of certificate holders utilized by LaSalle had been in existence for some thirty years and it might have been anticipated that some, perhaps many, of the persons whose names appeared thereon were deceased, with title to their certificates passing to their heirs or other persons, and that many might have changed their addresses in the intervening years. It is also argued that respondents had actual notice of this situation from the fact that some of the mailings were returned by the postal authorities. It is urged that due diligence on the part of respondents, particularly LaSalle, would have re-

quired the employment of a professional searcher to locate those who were the owners or had an interest in the certificates in question.

[1] We agree with the District Court that respondents were under no such duty or obligation. Particularly is this so in view of the Bondholders' Protective Agreement which required each certificate holder to furnish the trustee in writing with his post office address, as well as any change thereof, and that the same "shall be conclusively deemed the correct mailing address of such depositor." Of some 1500 original certificate holders, all but thirty-nine had acted to protect their interest prior to the petition to fix a bar date. It is unreasonable to conclude that these thirty-nine certificate holders, some of whom had acquired their certificates by transfer from the original holder and were unknown to LaSalle, should be absolved of all responsibility in protecting their rights when the means to do so were at hand. It is even more unreasonable to conclude that the responsibility was on LaSalle to employ searchers to locate certificate owners, some of whose names and more of whose addresses were unknown. We agree with the finding of the District Court that the means employed by respondents constituted due diligence on their part.

[2] On the issue of fraud alleged by petitioners, the District Court in its opinion stated (215 F.Supp. page 854):

> "The petitioners' contention that Randolph-Wells and LaSalle were guilty of fraud or misconduct in giving the notice required by the Court order was not supported by any evidence."

With this statement we agree.

We find without merit other issues raised and discussed in the District Court. Petitioners raise an issue in this

Court which was neither pleaded nor argued in the District Court, which could be ignored for that reason. Even so, we will state the issue and discuss it briefly. As already noted, Randolph-Wells in its voluntary reorganization in 1960 paid to LaSalle some $96,000, to protect LaSalle against claims of holders of outstanding securities. Prior to the bar date as fixed by the Court's decree, security holders presented their claims to LaSalle and were paid some $15,000. Thus, of the amount deposited with LaSalle by Randolph-Wells, there remained in the hands of the former on the cut-off date, as fixed by the bar order some $81,000, which the Court thereafter ordered returned to Randolph-Wells.

It is argued by petitioners that the deposit made by Randolph-Wells with LaSalle was an irrevocable appropriation, to be used by LaSalle in payment of the outstanding securities. In other words, it is asserted that Randolph-Wells by reason of the deposit with LaSalle discharged its obligations to the security holders and lost all control of and right to the money.

Petitioners cite only Steel Cities Chemical Co. v. Virginia-Carolina Chemical Co., 2 Cir., 7 F.2d 280, in support of their contention. This case is of no aid to petitioners; in fact, by implication it supports the action of the Court in ordering the remainder of the deposit returned to Randolph-Wells. In the cited case, the receiver of a mortgagor sought return of funds which the mortgagor had deposited with a trustee for the purpose of paying creditors. The Court in denying the receiver's right to recover stated (7 F.2d page 283):

> "And the indenture also expressly declared that in moneys so deposited the company making the deposit should have 'no rights or interest in any such moneys,' unless and until the holders of the bonds or coupons

have failed to present them for payment within the periods stated in the indenture. And in this case no suggestion has been made that the period within which coupon holders had to present their coupons for payment had expired."

[3] In contrast, in the instant case it was only that portion of the deposit unclaimed by creditors which was ordered returned to Randolph-Wells, after the cut-off date We do not understand from petitioners' argument where they think the unclaimed portion of the deposit should go. Certainly it does not belong to LaSalle, the trustee, who makes no claim to it. Equally certain, it does not belong to the security holders, who made no claim prior to the cut-off date. By the process of elimination, if nothing else, the money belongs to Randolph-Wells. Petitioners' argument, if sustained, would in effect void the Court order fixing the cut-off date. In our judgment, this issue, belatedly raised by petitioners, must be rejected.

The order appealed from is Affirmed.

215 F.Supp. 849 (1963)

In Proceedings for the Reorganization of

RANDOLPH-WELLS BUILDING CORPORATION, Debtor.

No. 7464.

United States District Court

E. D. Illinois.

March 29, 1963.

JUERGENS. District Judge.

In this corporate reorganization proceedings Randolph-Wells Building Corporation (hereinafter referred to as "Randolph-Wells") on March 27, 1961 filed its amended petition asking that bankruptcy proceedings No. 7464 be re-opened for the purpose of limiting the time within which bonds of the City State Safe Deposit Company might be exchanged for securities of Randolph-Wells (hereinafter referred to as "1935 Bonds"). The petitioner, Randolph-Wells, is the corporate successor to City State Safe Deposit Company, an Illinois corporation (hereinafter referred to as "City State").

On February 1, 1927 City State issued its First Mortgage 6 Per Cent Twenty-Year Sinking Fund Gold Bonds (hereinafter referred to as "1927 Bonds") in the aggregate principal amount of $2,359,500.00. The 1927 bonds were defaulted and on June 19, 1930 the holders thereof entered into a Bondholders' Protective Agreement, whereby they were to deposit their bonds with the Trust Company of Chicago, as depositary, and to receive certificates of deposit in exchange for their bonds.

City State, however, again ran into financial difficulties, and on February 6, 1935 a proceeding, entitled "In the Matter of City State Safe Deposit Company, No. 7034," was filed in this Court to reorganize City State under the provisions of Section 77B of the Bankruptcy Act. A reorganization plan was submitted and approved on July 8, 1935 in proceeding No. 7034, and Randolph-Wells was organized as the corporate successor of City State.

On November 14, 1935 an order was entered in proceeding No. 7034 which provided, among other things, that the new corporation, Randolph-Wells, upon receiving the conveyance of the debtor's property from the trustees be authorized and directed to execute its new mortgage bonds, issuable to the holders of the 1927 bonds in the amount of $2,359,500.00, to the Trust Company of Chicago for distribution to the holders of the old first mortgage bonds of City State, and to execute, accept and deliver to the Trust Company of Chicago, as trustee, its new indenture of mortgage and that the Trust Company of Chicago be authorized upon receipt of delivery of the 1935 bonds to authenticate the same and distribute the bonds and voting trust certificates deposited with it by the trustees to the holders of the 1927 bonds in the following manner:

> (a) New bonds of the corporation to be distributed in the same principal amount as the principal amount of the old first mortgage bonds presented by the holders and
>
> (b) Voting trust certificates evidencing common stock of the new corporation to be distributed in proportion of one share of such stock for each $100.00 principal amount of the old first mortgage bonds presented; such distribution to be made upon presentation and surrender by the holders of the 1927 bonds, accompanied by all unpaid interest coupons appertaining thereto, or upon presentation of certificates of deposit

evidencing the deposit of the bonds and coupons under the terms of the Bondholders' Protective Agreement dated July 19, 1930.

Randolph-Wells executed and delivered to the Trust Company of Chicago an indenture of mortgage dated November 1, 1935; executed and delivered to the Trust Company of Chicago its new mortgage bonds (1935 bonds) in the amount of $2,359,500.00, dated November 1, 1935 and maturing twenty-five years after date and secured by the mortgage indenture; and issued and delivered to voting trustees shares of its common stock. Randolph-Wells, in accordance with the provisions of the 1935 indenture, directed the Trust Company of Chicago on or about November 26, 1935 to authenticate and deliver 1935 bonds in exchange for the 1927 bonds or certificates of deposit.

A final decree was entered in proceeding No. 7034 on April 20, 1936. There was no provision made in the proceeding limiting the time within which the holders of the 1927 bonds or certificates of deposit would be entitled to exchange their 1927 bonds or certificates for 1935 bonds and voting trust certificates or shares of stock.

Randolph-Wells by July 9, 1937 found itself in financial difficulty and was in default on the 1935 bonds; whereupon, this proceeding (Bankruptcy No. 7464) was commenced under Section 77B of the Bankruptcy Act.

This Court on May 2, 1939 entered an order approving the plan of reorganization pursuant to which the 1935 bonds were subordinated to a new first mortgage and converted the 1935 bonds from fixed interest bearing bonds to cumulative income bonds.

A final decree in the proceeding was entered on June 15, 1939, which ordered and directed the Trust Company of Chicago to carry out each of the directions, powers and au-

thority provided in the reorganization proceedings. No provision was made limiting the time within which the holders of the 1927 bonds or certificates of deposit would be entitled to exchange such bonds or certificates.

On March 10, 1950 the Trust Company of Chicago resigned as trustee under the 1935 indenture and the supplemental indenture, and LaSalle National Bank (hereinafter referred to as "LaSalle") was designated and appointed by Randolph-Wells as successor trustee under the indentures on March 15, 1950. The records relating to authentication, issuance and delivery of the 1935 bonds were caused to be delivered to LaSalle by Randolph-Wells.

At the time of LaSalle's appointment as successor trustee, $2,298,000.00 in aggregate principal amount of the 1935 bonds had been authenticated and were outstanding as were also 22,980 shares of stock. Randolph-Wells also caused to be delivered to LaSalle $61,500.00 in aggregate principal amount of 1935 bonds which were not authenticated and had not been delivered to the bondholders. Subsequently, 1927 bonds or certificates of deposit were presented to LaSalle and were exchanged for authenticated 1935 bonds together with 135 shares of stock.

With the consent of the holders of approximately $2,000,000.00 in aggregate principal amount of the 1935 bonds, Randolph-Wells on November 1, 1960 consummated a voluntary reorganization. To effect this reorganization it was necessary to obtain the release of the 1935 indenture and the supplemental indenture. LaSalle, however, refused to release the indentures unless it received a sum of money sufficient to satisfy completely the claims of all the holders of the 1935 bonds who had not consented and of all the 1935 bonds to which the holders of unsurrendered 1927 bonds or certificates would be entitled upon surrender of the bonds or certificates. A sufficient sum of money was paid over and

LaSalle released the indentures. The sum, including aggregate principal amount plus earned interest to November 1, 1960, was $95,991.84.

By its amended petition of March 27, 1961, Randolph-Wells sought to have Cause No. 7464 reopened and a bar date fixed prior to which holders of the 1927 bonds or certificates might surrender their bonds or certificates of deposit and further asked the Court to determine the status of LaSalle since LaSalle asserted it was unable to determine its liability or obligation to the holders of the 1927 bonds or certificates of deposit by reason of its becoming successor trustee to the Trust Company of Chicago or by reason of the orders of this Court in proceedings Nos. 7034 and 7464.

On July 17, 1961 this Court entered its order setting the cause down for hearing on September 6, 1961 and caused to be prepared a notice of the proceedings as follows:

> "Costello, Wiechert, Roberts & Gundlach, Attorneys,
> "First National Bank Building,
> "East St. Louis, Illinois
> "Bridge 1-2464
> "Sonnenschein Lautmann Levinson Rieser Carlin & Nath
> "77 W. Washington Street
> "Chicago, Illinois
> "ANdover 3-6400

"In the United States District Court for the Eastern District of Illinois. In the Matter of RANDOLPH-WELLS BUILDING CORPORATION, Debtor, No. 7464.

> "Notice is hereby given to the holders of City State Safe Deposit Company First Mortgage 6 Per Cent Twenty Year Sinking Fund Gold Bonds dated February 1, 1927, and certificates of deposit evidencing the deposit of such bonds with The Trust Company of Chi-

> cago, as depositary under the Bondholders' Protective Agreement of June 19, 1930, that a petition has been filed by RANDOLPH-WELLS BUILDING CORPORATION, Debtor, in the United States District Court for the Eastern District of Illinois, to secure an order limiting the time within which City State Safe Deposit Company First Mortgage 6 Per Cent Twenty Year Sinking Fund Gold Bonds dated February 1, 1927, and certificates of deposit evidencing the deposit of such bonds with The Trust Company of Chicago, as depositary under the Bondholders' Protective Agreement of June 19, 1930, may be exchanged for RANDOLPH-WELLS BUILDING CORPORATION stock and first mortgage bonds dated November 1, 1935.
>
> "Notice is further given that a hearing on said petition will be held in the United States District Court for the Eastern District of Illinois at East St. Louis, Illinois, on September 6, 1961, at the hour of 9:30 A.M., at which time and place you are notified to appear if you so desire."

The debtor was ordered to cause the foregoing notice to be published in the Chicago Daily Law Bulletin in Chicago, Illinois (a newspaper of general circulation in the vicinity of the bankrupt corporation), and in The Journal in East St. Louis, Illinois (a newspaper of general circulation at the seat of the Court), for three successive weeks, commencing no later than July 30, 1961, and further to be sent by registered mail, deposited in the United States mail no later than August 7, 1961, to the last known address of each of the registered owners of the outstanding 1927 City State Safe Deposit Company First Mortgage 6 Per Cent Twenty-Year Sinking Fund Gold Bonds.

The Court's memorandum, setting forth the reasons for its order, appears in D.C., 197 F.Supp. 327.

The hearing was held on September 6, 1961. The publications required in the Court's order had been effected and notices had been mailed by registered mail as required.

The Court entered a bar order fixing a date of exchange of no later than March 5, 1962.

On April 25, 1962 Ethel M. Boese et al. filed their petition to vacate the order of September 6, 1961, or, in the alternative, to extend the bar date for surrender of unexchanged City State Safe Deposit Company certificates of deposit, and on July 19, 1962 filed an amendment and supplement to the petition filed on April 25, 1962.

By their petition and supplement, the petitioners seek to have this Court vacate or extend the bar date heretofore fixed in order to permit them to exchange their securities, asserting, inter alia, that the Court was without jurisdiction to enter the bar. This contention will not further be considered since it was dealt with at length in this Court's previous memorandum and the reasons for its action were fully set out therein.

Petitioners further assert that LaSalle made no effort to locate the owners of the unexchanged certificates of deposit or to bring up to date the records, made in the year 1930, of Randolph-Wells as to the names and addresses of the owners of unexchanged certificates of deposit; that LaSalle, the only party appearing in opposition to the petition to fix a bar date, was under the dominion of Randolph-Wells; that the notice of the hearing in this Court on September 6, 1961 is not understandable to a lay person and did not inform the holders of certificates of deposit that they could receive money for their bonds, including interest, by simply surrendering their certificates to the LaSalle Bank; that the published legal notice was inadequate to notify the certificate holders; that the notice sent by registered mail to the holders of the certificates of deposit was not adequate for the reason that such notice failed to reach the certificate holders and that those it did reach were unable to understand the

import of the notice; that the United States Securities and Exchange Commission in mid-February, 1962, distributed a publication showing a bar date different from that fixed by the Court in that the Commission stated erroneously that the bar date was May 5, 1962 rather than March 5, 1962; that Randolph-Wells withheld disclosure to the Commission that the bar date was March 5, 1962 and further furnished the Commission with erroneous information to excuse Randolph-Wells from hiring searchers to locate missing certificate holders; that William B. Greene of American Equities Group, Inc., offered to locate missing holders for the LaSalle Bank without charge to it; that the offer was refused by LaSalle; that a like offer was made to Randolph-Wells, who also declined and refused to tell Greene of the location of the Court in which Randolph-Wells was reorganized and declined to cooperate with Greene. The petitioners assert that the failures on the part of Randolph-Wells and LaSalle were gross breaches of duty to petitioners and others similarly situated and charge that both Randolph-Wells and LaSalle were guilty of gross fraud and consummate bad faith and further assert that this Court had no statutory or other authority, nor did it have jurisdiction, to discharge LaSalle from its fiduciary obligation to petitioners.

On July 26 and 27, 1962 a hearing was had on the petition to vacate the order of September 6, 1961, or, in the alternative, to extend the bar date for surrender of unexchanged City State Safe Deposit Company certificates of deposit.

At the hearing it developed that at the time the Court set the bar date and entered its bar order there were thirty-nine holders of certificates of deposit and one bondholder (the name and address of the bondholder was unknown). It was affirmatively shown that the notice required by the Court had been published in accordance with its order and that a copy of the notice had been mailed by registered mail

to each of the holders of the certificates of deposit at the last known address as shown by the list of holders of certificates of deposit of City State Safe Deposit Company. Of the thirty-nine registered letters mailed, seventeen were actually received; the remaining twenty-two were returned by the Postal Department.

Between August 30, 1961 and February 15, 1962, five certificate holders appear to have surrendered their certificates as shown by Recap of Unissued Bond Account of Randolph-Wells Building Corporation. On March 6, 1962, $74,957.69 was surrendered to Randolph-Wells Building Corporation, being the balance due the corporation pursuant to the bar order effective as of March 5, 1962, less expenses incurred.

It was also shown that in addition to the publication and the mailing of the notice as directed by the Court, a copy of this Court's order of September 6, 1961 was mailed on September 8, 1961 to the last known address of each of the thirty-nine certificate holders as shown by the list of holders of certificates of deposit of City State Safe Deposit Company. Of this number sixteen were received; the rest were undelivered.[1]

The petitioners' contention that Randolph-Wells and La-Salle were guilty of fraud or misconduct in giving the notice required by the Court order was not supported by any evidence.

The petitioners assert that the notice required by the Court was deficient in the following respects:

> 1. That although there was only one bondholder involved and a number of certificate holders, yet the notice required listed the bonds ahead of the certificates of deposit and emphasized bonds rather than certificates;

1. This paragraph ends the portion of the District Court's opinion adopted by the Court of Appeals.

2. That the notice listed the Trust Company of Chicago as depositary under the Bondholders' Protective Agreement, whereas, in fact the Chicago Trust Company was depositary under the agreement;

3. That the notice showed the Protective Agreement to be dated June 19, 1930, whereas, in fact the Protective Agreement was dated July 19, 1930;

4. That the notice failed to show the certificate holders that they were entitled to exchange their certificates for money.

The Court is unable to see wherein the first deficiency noted, namely, that the notice refers first to the bondholders rather than the certificate holders, is defective. The wording of the notice in this respect is entirely in accord with the wording throughout the entire proceedings in that the bondholders and certificate of deposit holders appear in that order, which appears to the Court to be the proper method of listing the securities, i. e., in the order of their issuance.

While it is true that the notice does in fact show the Trust Company of Chicago as the depositary under the Bondholders' Protective Agreement of June 19, 1930, rather than the Chicago Trust Company as depositary under the Bondholders' Protective Agreement of July 19, 1930, the Court does not believe that a person would be misled by the notice since a perusal of the remainder of the notice makes clear the securities concerned.

The petitioners' assertion that the failure of the notice to show that the bonds and certificates might be surrendered for cash rather than the right of exchange as shown in the notice was misleading, is without merit. The notice clearly shows that some action on the part of the holders of the securities should be taken since a hearing was being held upon a petition to secure an order limiting the time within

which exchanges could be made. In any event, this deficiency, if it is a deficiency, was remedied by the September 8, 1961 mailing of this Court's order dated September 6, 1961, wherein it was clearly pointed out that the securities might be surrendered for cash and stock of Randolph-Wells.

The petitioners make much ado about the fact that the return address shown on the registered receipts should have been noted by LaSalle and its records changed to note changed names and addresses. The Court does not believe that it was the duty of the trustee to examine each of the numerous return receipts it received as a result of the mailing to determine any discrepancies that might appear.

One of the certificate holders says she received notice of the Court hearing but she was unable to understand it and awaited further instructions subsequent to the Court hearing, which was scheduled for September 6, 1961. This person failed to receive the Court order. It must be noted that the Court order sent to this certificate holder was mailed to the same person, addressed to the same address as the notice. The Court finds that the owner of the certificate of deposit, when she received the notice, should have noted that her name had been changed by marriage and that her address had been changed from that shown on the letter. She did nothing to notify LaSalle or Randolph-Wells of this change of name or change of address. She should not now be heard to complain that LaSalle or Randolph-Wells was negligent and breached their duty while she remained idle and did nothing to correct a situation which she knew to be erroneous. She was the negligent party.

One of the certificate holders by deposition stated he had received the notice but that he did not understand its meaning, thought it was of no value and did nothing to protect his interests prior to the bar date.

Of the seventeen who first received notice, only five took it upon themselves to surrender their securities before the bar date. The rest took no action.

Section 1.09 of the Bondholders' Protective Agreement provides as follows:

> "§ 1.09. Before issuing any certificate the Depositary may require a Depositor to furnish to it in writing his post-office address. Such address or any change therein, written notice of which is given by the Depositor to the Depositary prior to the mailing or sending of any notice or any other document or the distribution of any securities, shall be conclusively deemed the correct mailing address of such Depositor for the mailing or sending of such notice, document, or securities. Certificates of deposit, stock certificates, bonds, notes, checks and any other securities which at any time may be issuable or distributable to the Depositor may be mailed to him by the Depositary or the Committee at his address appearing on the books of the Depositary, but such mailing shall be at the Depositor's risk."

Thus there is placed on the depositors a duty to supply, firstly, their correct mailing address and, secondly, the duty to notify the depositary of any change in that address. The original list consisted of in excess of ninety pages and contained the names and addresses of about fifteen hundred holders of certificates of deposit. Considering the long and bumpy trail of this reorganized corporation and its shaky predecessor, the various trustees appear to have accomplished a monumental task since over ninety-eight per cent of the original holders of the City State securities have exchanged their securities for Randolph-Wells securities. Of about fifteen hundred original holders, all but thirty-nine had acted to perfect their interest prior to the application to this Court for a bar date. Subsequently, five additional holders have perfected their rights. Twelve failed to act

after receiving notice and twenty-two of the original fifteen hundred appear to have failed to receive actual notice, but these received constructive notice through publication.

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 657, 94 L.Ed. 865, the United States Supreme Court had the following to say:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Cases cited). The notice must be of such nature as reasonably to convey the required information, * * *, and it must afford a reasonable time for those interested to make their appearance, (Cases cited). But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. * * *"

The Court further said:

> "This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights. (Cases cited).
>
> "Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient. * * *"

In the instant case both the debtor (by following the Court order in giving the required notice) and LaSalle (by mailing notices of this Court's order, establishing the bar

date, to the addresses shown on the list supplied to them by their predecessor, who in turn had received them from the depositors themselves) have in effect acted with due diligence in giving the required notice.

The petitioners assert that the failure of LaSalle and Randolph-Wells to utilize the service of a searcher was erroneous. According to the testimony, William B. Greene, representing American Equities Group, Inc., in the business of locating missing persons, first offered to locate the missing persons for LaSalle for a fee and subsequently asserted he would do so without charging LaSalle a fee. LaSalle declined to utilize his services and referred him to Randolph-Wells. Randolph-Wells asked if he represented any of the certificate holders and, upon finding that he did not, declined to utilize his services or to supply him with a list of the missing certificate holders. The Court does not believe that it was the legal or moral duty of either LaSalle or Randolph-Wells to retain Greene to find the missing persons. Certainly they were not authorized to do so by court order. Nor does the Court believe it was the duty of either LaSalle or Randolph-Wells to turn over to Greene a list of the missing certificate holders. Such action certainly does not establish fraud or deceit or breach of duty on the part of either LaSalle or Randolph-Wells. Greene testified that on either February 23 or February 26, 1962 he had contacted LaSalle with a view to representing them or the owners of the certificates of deposit in locating the missing certificate holders. He further testified that prior to March 6, 1962 (March 5, 1962 was cut-off date fixed by the Court) he had no power of attorney to represent any of the City State bondholders or certificate holders.

The petitioners also make much ado about the fact that the United States Securities and Exchange Commission sent out a publication showing a cut-off date of May 5, 1962,

rather than on March 5, 1962, as set by the Court. There was no testimony or evidence whatsoever to show that this publication in any way misled any of the holders of securities involved. There was no evidence to show that any of the certificate holders had even seen or heard of the publication prior to the cut-off date fixed by the Court.

[1] While the original order reopened the proceedings in order to fix a bar date, such action was not a change or modification of a plan but was merely an administrative matter aiding in effectuating the purpose of the plan and, as found in its previous order and as pointed out in its memorandum, this Court clearly had jurisdiction to do so. There are currently, however, different considerations involved. The question here is whether the bar order once entered can be extended. Once a bar order has been set and the bar date has passed, the Court has no jurisdiction to extend the bar date or to permit an exchange of securities after the time for making such an exchange has expired. Although a court may reopen proceedings to enter a bar order, yet once that order is entered it cannot be extended after the bar date has passed. In re City Stores Co., 1950, D.C., 94 F.Supp. 266. Detroit Harbor Terminals v. Kuschinski, 6 Cir., 1950, 181 F.2d 541.

[2] The Court finds that the petition to vacate the order of September 6, 1961, or, in the alternative, to extend the bar date for surrender of unexchanged City State Safe Deposit Company certificates of deposit and the amendment and supplement thereto should be dismissed.

Parties to settle the order.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 587

ETHEL M. BOESE, ET AL.,
Petitioners,

vs.

RANDOLPH-WELLS BUILDING CORPORATION AND LA SALLE NATIONAL BANK,
Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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THE BUNTHORP-WARNER PRINTING COMPANY, CHICAGO

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Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED.

Since all parties agree that *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), controls, the only question really presented* is factual: whether the evidence supports the findings of the district court, affirmed by the court of appeals, that the respondents acted with diligence in complying with the district court's order in preparing, publishing and mailing notice of the hearing on the application for a bar order and in mailing the bar order itself.

* As to questions 2 and 3 in the petition for certiorari (p. 2), see pages 5 and 6, *infra*.

STATEMENT.

Under a 1935 bankruptcy reorganization of City State Safe Deposit Company ("City State"), the corporate predecessor of respondent Randolph-Wells Building Corporation ("Randolph-Wells"), City State securities were made exchangeable in securities of Randolph-Wells. In 1961, after ninety-eight per cent (98%) of the City State securities had been exchanged, Randolph-Wells applied to the district court to reopen the reorganization proceedings for the purpose of limiting the time within which further exchanges could be made (R. 150-155, 159).

The application was personally served on respondent La Salle National Bank ("La Salle"), the successor trustee under the mortgage indenture securing the 1935 Randolph-Wells securities. La Salle opposed the application on behalf of the holders of the unexchanged 1927 City State securities* (R. 165, 166).

By order entered July 17, 1961, the district court set the application for hearing on September 6, 1961, and directed Randolph-Wells (a) to prepare a notice of the hearing in the form prescribed by the court, (b) to publish this notice in journals in Chicago (where Randolph-Wells' property is located) and East St. Louis, Illinois (the seat of the district court) for three successive weeks, and (c) to mail a copy of this notice by registered mail to the last known address of each of the registered owners of City State securities. Randolph-Wells prepared, published and mailed notice in compliance with the order of the district

* In its first opinion, *In re Randolph-Wells Building Corporation*, 197 F. Supp. 327 (E. D. Ill. 1961), the district court held that La Salle, as indenture trustee, had the power and duty to represent the City State security holders so long as the City State securities may validly be presented for exchange. 197 F. Supp. at 332. Quoted in opinion of court of appeals, 332 F. 2d 963, at pages 964, 965.

court. In mailing that notice Randolph-Wells used the list of names and addresses of the owners of City State securities that was maintained by La Salle and its predecessors. This list, which was the only record available, had been compiled pursuant to a bondholders' protective agreement. Thirty-nine such notices were mailed by Randolph-Wells, seventeen were delivered and twenty-two were returned to sender; the evidence shows that those twenty-two had failed to advise the trustee of changes in interests and addresses as required by the bondholders' protective agreement. (Opinion of district court, *In re Randolph-Wells Building Corporation,* 215 F. Supp. 849, 853-855 (E. D. Ill. 1963).)

At the hearing on September 6, 1961 the Court entered an order barring further exchanges after March 6, 1962. On September 8, 1961, La Salle mailed a copy of the bar order by first class mail to the last known address of each of the City State security holders (R. 285, 286).

Five holders surrendered their City State securities before the bar date of March 6, 1962; these were redeemed for cash and Randolph-Wells stock (R. 240).

> The remaining certificate holders, including petitioners and those whom they claim to represent, neither surrendered their securities nor took any steps to redeem them until after the expiration of the bar date. (Opinion of court of appeals 332 F. 2d 963, at page 965.)

On April 25, 1962, after the bar date had passed, the alleged holders of still-unexchanged City State securities petitioned the court to extend the bar date or to set aside the bar order. After a trial on the merits, the district court found the issues and the facts against the petitioners and entered an order dismissing the petition. *In re Randolph-Wells Building Corporation,* 215 F. Supp. 849 (E. D. Ill. 1963). On appeal, this order was affirmed. 332 F. 2d 963 (7 Cir. 1964).

ARGUMENT.

1.

The petition for certiorari presents no legal issue. *Mullane* v. *Central Hanover Bank and Trust Company*, 339 U. S. 306 (1950), is accepted by both courts below and by all parties as fixing the due process requirements of notice. *Mullane* holds that, where trustee and beneficiaries occupy adversary positions and where the names and addresses of the beneficiaries are on the books of the trustee, published notice should be supplemented by at least "ordinary mail to the record addresses"; on the other hand, where the addresses and interests of beneficiaries are unknown to the trustee, published notice is sufficient (339 U. S. 306, 317, 318).

In the case at bar, both the courts below found from the evidence that the Mullane requirements had been met. The findings are that notice was served personally upon the trustee; that the trustee had the power to represent the beneficiaries; that notice was published in appropriate journals and served by registered mail on the security holders at their last known addresses; that the definitive list of names and addresses were those appearing on a registered list compiled pursuant to a bondholder's protective agreement providing for the deposit of City State bonds; that the use of this list complied with the court's order and with the requirements of diligence; that the text of the notice prescribed by the court was adequate.*

* The same persons who received the notice also received a copy of the bar order itself as soon as it was entered. We do not understand how their inaction can be attributed to supposed defects in the notice when they continued not to act after receiving the text of the order defining their rights.

These factual issues, and others, were decided adversely to petitioners by the district court. *In re Randolph-Wells Building Corporation,* 215 F. Supp. 849 (E. D. Ill. 1963). The court of appeals reviewed the evidence and sustained the findings of the district court. *In re Randolph-Wells Building Corporation,* 332 F. 2d 963 (7 Cir. 1964). Petitioners now seek a third review of the same questions of fact.

Even if there were doubt as to the correctness of the findings below, petitioners are not entitled to such a review. The respondents should not be required to participate in yet another hearing on these issues. See *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 1963 (1923); *Rogers* v. *Missouri P. R. Co.,* 352 U. S. 524, 530, separate opinion by Mr. Justice Frankfurter (1957). Also see *Hamilton-Brown Shoe Company* v. *Wolf Bros. & Co.,* 240 U. S. 251, 257, 258 (1916). There is no constitutional issue to be decided here. See *Beck* v. *Washington,* 369 U. S. 541, 554, 555 (1962); *Milwaukee Electric R. & Light Co.* v. *Wisconsin,* 252 U. S. 100, 106 (1920).

2.

What petitioners now call a "jurisdictional" issue (Pet. for Cert., pp. 2, 21-25) is merely a rephrasing of an argument that was not pleaded in the district court and was rejected by the court of appeals on both factual and legal grounds (App. A. to Pet. for Cert., pp. 38-40). The issue is merely whether the district court has correctly interpreted the purpose of a deposit made pursuant to a voluntary reorganization; the court's "jurisdiction" to make this determination is beyond question and has never been challenged.

3.

Petitioners' third point (Pet. for Cert., pp. 2, 25-28) is actually nothing more than a rephrasing of their first point. None of the cases cited resembles the case at bar on the facts.

CONCLUSION.

The Petition for Writ of Certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 587

ETHEL M. BOESE, et al.,

Petitioners,

vs.

RANDOLPH-WELLS BUILDING CORPORATION and LA SALLE NATIONAL BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Randolph-Wells' brief (page 5) dogmatically asserts that there is no constitutional issue to be decided here. It cites for this *Beck* v. *Washington*, 1962, 369 U.S. 541, 554-55, and *Milwaukee Electric R. & Light Co.* v. *Wisconsin*, 1920, 252 U.S. 100, 106, wherein this Court observed that the Fourteenth Amendment does not "assure uniformity of judicial decisions . . . [or] immunity from judicial error . . . Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." These cases are inapposite for at bar the issue is under the Fifth Amendment and the case does not involve any claimed misapplication of state law by a state court. Most certainly this Court is interested in uniformity of decision in conformity with its own in the federal system and the elimination of error therein, particularly in the critical area of due process.

Contrary to the view of Randolph-Wells, the Court of Appeals considered that there was a "serious question" here as to whether the notice to petitioners of the pendency of the bar proceedings was sufficient to meet the standards of due process. (App. B, p. 34). The character of a case is determined by the questions involved and it has long been held that if from the questions it appears that some title, right, privilege or immunity, on which recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case is one arising under the Constitution or laws of the United States. *Starin* v. *New York City,* 1885, 115 U.S. 248, 257. No one can say with candor that the right of each petitioner to an opportunity to be heard on the bar order proceedings does not depend upon the Constitution of the United States.

In saying that the petition for certiorari presents no legal issue, it is clear that the strategy of Randolph-Wells is to engulf petitioners in the cacophonous assemblage of cases akin to those under the Federal Employers Liability Act, wherein this Court has been required laboriously to search the record to determine whether the evidence was sufficient to go to a jury, i.e. to make a second guess on the evidence and thus confer on the defeated party another hearing.

While the Court may view this as a partison claim in advocacy, the case at bar on the questions presented poses no conflict on the raw facts. It is true that in several important aspects the inferences from the facts are susceptible to different interpretations, such as whether the respondents exercised diligence in the giving of notice to the absentees on the basis of a thirty year old list of names and

addresses,[1] and, as well, the correlative question as to whether the absentees themselves were under a duty through the years up to 1961 to keep respondents informed of their whereabouts by reason of the terms of a "1930" Bondholders' Protective Agreement which was superceded, terminated and held for naught in 1936 by the approval of the plan and completion of the first bankruptcy reorganization.

But the ultimate findings on these issues are conclusions of law or, at least, a determination of mixed questions of law and fact. They are to be distinguished from findings of primary, evidenciary or circumstantial facts. *Helvering* v. *Tex-Penn Oil Co.*, 1937, 300 U.S. 481, 491. Moreover, the due process guarantee of hearing draws no distinction between questions of law and fact. *L. B. Wilson, Inc.* v. *Federal Communications Com'm.*, 1948, D.C. Cir., 170 F.2nd 793, 805.

The opinion of the Court of Appeals at bar never came to grips with the objection of petitioners that the notice was published in obscure newspapers or with the asserted defects in the notice itself, i.e. its failure to name the few absentees involved, its unintelligible message and its gross misrepresentation of what was going on. Assuming merely for argument that Randolph-Wells was diligent in mailing the notice, as found below, its publication in newspapers

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1. For Randolph-Wells (and the Court of Appeals) to call the list from which the addresses for mailing were culled a "registered list" is to give it undeserved eminence and sanctity. It was not derived from the books of the various depositaries wherein the names and addresses of holders of the certificates of deposit were to have been registered. (See Petition pp. 7-8). It was prepared in 1936, at the time the office of depositary ceased, by the last of the three depositaries to serve under the Bondholders' Agreement. It was made up from duplicate copies of the certificates of deposit on hand. It was only certified as correct with regard to certificates issued by the last depositary. (Petnrs. Exh. 4, Exh. Vol. p. 1, R. 394).

least likely to be read by the absentees and the irregularities in the notice itself are sufficient reasons, without regard to the issue of diligence, to deny the jurisdiction of the District Court over the absentees. Similar defects were held by this Court in *Schroeder* v. *New York*, 1962, 371 U.S. 208, to deprive the appellant there of due process of law. Consideration of these primary facts in the light of due process and concerning which facts there is no conflict in the record poses an issue of law and not one of fact.

Randolph-Wells states (page 4) as an inflexible rule the holding of this Court in *Mullane* v. *Central Hanover B. & T. Co.*, 1950, 339 U.S. 306, is that when the names and addresses of beneficiaries are on the books of a trustee, publication notice should be supplemented by ordinary mail to the record addresses, but when the addresses and interests of the beneficiaries are unknown, published notice is sufficient. (Citing to 339 U.S. at 317, 318). If this was all this Court said on the requirements of due process in *Mullane*, it took many words and a number of pages to reach this result. Just to mention a few observations pertinent here, this Court said that a notice must be reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action, it must be of such nature as to convey the required information (so they can choose whether to appear or not), and it must be given in a way that one desirous of actually informing the absentees might reasonably adopt to implement his volition. (339 U.S. at 314-15).

Abhorant to the Courts below and to Randolph-Wells is the recognition in *Mullane* that searches would be in order under the special circumstances of a particular case, this Court saying on this "Whatever searches might be required

in another situation under ordinary standards of diligence. . . ." (339 U.S. at 317). If the case at bar does not pose a situation wherein searches should be required, petitioners believe it is difficult to contemplate one that does.

Randolph-Wells and the Courts below place great weight on the fact that a copy of the District Court's bar order (without accompanying explanation) was sent to the absentees shortly after its entry on September 6, 1961. (Petnrs. Exh. 13a, Exh. Vol. pp. 61-64, R. 284). The District Court said that this cleared up the inadequacies of the notice. (App. B., pp. 50-51). Even if a person of ordinary intelligence receiving first the notice of the bar proceedings and then the bar order could discern what "was going on", or better yet, what had transpired, it makes no difference for the law is that an essential element of due process is the opportunity to be heard before the reaching of a judgment, and that a judgment without an opportunity to be heard is judicial oppression. *Galpin* v. *Page,* U.S. 1873, 18 Wall. 350, 368-69, 21 L.ed 959, 963. Also, as stated on page nineteen of the petition here, the sending out of the bar order could not retroactively supply constitutional validity to the notice upon which the bar proceedings stands or falls.

No matter how Randolph-Wells would like to have it, there is no inflexible formula for gauging due process. *Walker* v. *Hutchinson,* 1956, 352 U.S. 112, 115. It is for this reason that issues such as the one at bar are not easy of solution and may not be varnished over with a simple application of headnote generalities. In *Schroeder,* supra, this Court said, "As was emphasized in Mullane, the requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process—

the right to be heard." (371 U.S. at 212).[2] The practical effect of the decisions below is to eliminate the requirement that some reasonable effort be made to notify parties of the pendency of proceedings affecting them. The decisions below convert due process into a meaningless gesture, a feint. It is vital then that this Court review this case in which the facts are so in contrast to anything previously considered by it, and particularly so for future guidance to litigants caught in a similar web of nice sounding legal generalities and who, otherwise, may never obtain equal justice under the law, notwithstanding valiant efforts to that end. This Court has stated that it stands ready to correct violations of constitutional rights. *United States* v. *Handy*, 1956, 351 U.S. 454, 462. Violations abound at bar. Question 1 submits a case, petitioners believe, "within the indispensable area of this Court's jurisdiction."

As petitioners interpret Randolph-Wells' rejoinder to their argument on question 2, it amounts to a concession that the $96,000 deposited by it with the trustee, LaSalle, was pursuant to its voluntary reorganization and not, therefore, a distribution under the plan of reorganization. The use by Randolph-Wells of Section 204 of the Chandler Act to implement its voluntary reorganization is a perversion of the purpose of the Act and the intent of Congress. This should not be tolerated. Randolph-Wells' refusal to be-

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2. Amazing as it is, the bar proceedings were underway for five months before any notice was given the absentees (R. 134, 168), during which period the District Court had under advisement on briefs critical issues as to its power to open up the 1939 reorganization and whether the $96,000 deposited with LaSalle was a trust fund for the absentees or an indemnity deposit. (R. 149). Petitioners never had an opportunity to be heard on these issues. The notice given stated that the hearing on the bar petition would be September 6, 1961, and the Court pre-empted this hearing by its opinion and order of August 30, 1961, deciding the first issue unfavorably to the absentees. (R. 170, 188a).

come involved in question 3 is honed perhaps from a desire to avoid exposure on this front.

CONCLUSION

For the reasons expressed herein and in the petition, a writ of certiorari should issue.

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